Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NEWSWEEK, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS, and ROBERT F. MILLIGAN,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment of the United States Constitution require not only that the state provide a procedure under which taxpayers can obtain relief from an invalid tax but also that the state provide notice of the existence of that procedure when the tax is due in order for that procedure to satisfy the state's due process obligations?

2. Must a state, in order to meet its obligations under the due process clause, provide a procedure under which taxpayers can obtain relief from an invalid tax that fully protects taxpayers from all sanctions, including penalties and interest charges?

3. Is a refund statute which provides that the state "may" refund tax payments made when no tax was due—which, for more than fifty years, has been interpreted as *requiring* refunds for taxes paid when no tax was due—a remedy that may not constitutionally be withdrawn "midstream" after a taxpayer has paid taxes in anticipation of filing for a refund, under *Reich v. Collins*, 513 U.S. 106 (1994) and the due process clause?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties to the appellate proceeding in the District Court of Appeal of Florida, First District, whose judgment is sought to be reviewed.

Newsweek, Inc., a wholly-owned subsidiary of The Washington Post Company, appellant below.

Department of Revenue of the State of Florida, appellee below.

Lawrence H. Fuchs, as Executive Director of the Department of Revenue of the State of Florida, appellee below.

Robert F. Milligan, as Comptroller of the State of Florida, appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Newsweek, Inc. respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the District Court of Appeal of Florida, First District, denying Newsweek meaningful backward-looking relief for payment of a tax imposed under a tax scheme that had previously been found to be unconstitutional.

OPINIONS BELOW

The order of the Supreme Court of Florida declining review is set forth in Appendix A. The opinion of the District Court of Appeal of Florida, First District, reported at 689 So. 2d 361 (Fla. Dist. Ct. App. 1997), is set forth in Appendix B. The judgment entered by the

Circuit Court in and for Leon County, Florida, is set forth in Appendix C. The order of the Florida District Court of Appeal, First District, denying rehearing, rehearing *en banc*, and certification of a question of great public importance, is set forth in Appendix D.

JURISDICTION

The District Court of Appeal of Florida, First District, issued its opinion on February 18, 1997, rejecting petitioner's claim under the due process clause of the Fourteenth Amendment of the United States Constitution that petitioner was entitled to a refund of a tax that had been found unconstitutional. Petitioner timely filed motions for rehearing, for rehearing *en banc*, and for certification of a question of great public importance. The District Court of Appeal denied these motions on March 27, 1997. Petitioner timely filed a petition for discretionary review in the Supreme Court of Florida. The Supreme Court of Florida denied the petition on July 17, 1997. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portion of which is set below:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This petition seeks review of a Florida court decision denying petitioner a refund of sales tax imposed by a Florida tax scheme that had been declared invalid as a violation of the First Amendment.

The Unconstitutional Tax

In 1988, Magazine Publishers of America, Inc., and several individual publishers, challenged a tax scheme imposing sales tax on magazines but not on newspapers as a violation of the First Amendment of the United States Constitution, asking for declaratory and injunctive relief. The Supreme Court of Florida upheld the trial court's judgment that the tax scheme was unconstitutional. *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992).[1] The court also granted injunctive relief by imposing the sales tax on newspapers. 604 So. 2d at 463-64. The injunction removing the content-based discrimination became effective December 9, 1990. App. 4a.[2]

The tax at issue, however, had been in effect since January 1, 1988. *See* Fla. Stat. §§ 212.08(7)(w), 212.05(1)(i) (Supp. 1988); App. 3a. No relief was expressly requested by Magazine Publishers of America for taxes due or paid during the almost three-year period between January 1, 1988 and December 9, 1990, nor was such relief provided by or discussed by the Supreme Court of

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[1] The Florida Supreme Court initially invalidated the tax scheme as an unconstitutional discrimination between types of media, a decision that was vacated and remanded by this Court for further consideration in light of *Leathers v. Medlock*, 499 U.S. 439 (1991). *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (Fla. 1990), *vacated and remanded*, 499 U.S. 972 (1991). On remand, the Florida Supreme Court found the tax scheme unconstitutional because the Department of Revenue distinguished between magazines and newspapers on the basis of their content. *Magazine Publishers of America*, 604 So. 2d at 462-63.

[2] The timing appears to reflect the effective date of the injunction issued by the Florida Supreme Court in its initial decision in the case. *See Magazine Publishers of America*, 565 So. 2d 1304, 1310-11 (determining that the appropriate remedy was to strike the exemption for newspapers and ordering its decision to become final 90 days after issuance of mandate). That decision issued May 31, 1990. Rehearing was denied September 10, 1990. Thus, 90 days after issuance of mandate was December 9, 1990.

Florida. *See Magazine Publishers of America,* 604 So. 2d 459.

The Refund Proceedings

Newsweek followed the method then recognized in Florida for challenging an unlawful tax. It paid the tax, then timely filed a claim with the Department of Revenue for a refund of tax paid between January 1, 1988 and December 9, 1990, App. 4a, pursuant to Section 215.26, Fla. Stat., App. 15a-16a. Had Newsweek failed to pay the tax to the Department of Revenue, under Florida law as then interpreted, Newsweek would have been subject to an automatic penalty set at 25 percent of the tax due, Fla. Stat. Section 212.12(2)(a), interest at a rate of 1 percent per month, Section 212.12(3), seizure and sale of its property to satisfy the amount due, Section 212.15(4), and cancellation of its sales tax license (and therefore the right to sell magazines), Section 212.18(3).

After the Department of Revenue denied a refund, Newsweek filed suit in circuit court claiming, *inter alia,* that denial of a refund violated the due process clause of the United States Constitution. App. 4a. Newsweek asked for summary judgment on its due process claim, which was denied. The Department of Revenue asked for summary judgment as to all claims, which was granted. App. 11a. Newsweek appealed the decisions rejecting its due process claim to the District Court of Appeal. App. 4a.

The District Court of Appeal affirmed the trial court's decision. The court interpreted Fla. Stat. Section 72.011 (1987) to provide a predeprivation remedy permitting taxpayers to challenge taxes in advance by paying contested taxes into the registry of the court. App. 5a. Therefore, the court held, the state was not required by the federal due process clause to grant a refund under its refund statute, Fla. Stat. Section 215.26. App. 5a-7a. One of the three judges concurred on the additional ground that retroactive application of the decision in

Magazine Publishers of America was not required in a subsequent case, and that equitable considerations justified the denial of retroactive relief. App. 8a-9a. Another judge concurred on the "narrow ground" that Section 72.011 and another statute, Section 120.575, taken together provided an adequate predeprivation procedure. App. 9a.[a]

Newsweek moved for rehearing, rehearing *en banc,* and certification to the Supreme Court of Florida on the ground that Section 72.011 did not provide "a clear and certain remedy," as required by the due process clause, because that section had not previously been declared or understood to be available to taxpayers before they received a final *assessment,* and on the further ground that Florida was required under *Reich v. Collins,* 513 U.S. 106 (1994), to honor the refund statute it had held out to taxpayers when they paid their taxes. Newsweek Mot. for Reh'g, Reh'g *en banc,* and Certification at 4-5, 9. The District Court of Appeal summarily denied all three motions on March 27, 1997. App. 12a.

Newsweek petitioned the Supreme Court of Florida for discretionary review on the ground that under the court of appeal's decision Florida had not satisfied the requirements of due process delineated in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco Dept.,* 496 U.S. 18 (1990), and *Reich v. Collins.* Newsweek Pet'n

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[a] Fla. Stat. Sections 72.011, 215.26, and 120.575 (1987) are set forth in Appendix E. These are the statutes that set forth procedures to challenge unlawful taxes in 1988, and with inconsequential wording changes, through December 1990, during which the tax in question was due. The state legislature has made some revisions since that time, none of which is material to the instant case. In 1991, the legislature expressly made Section 72.011 available for judicial review of refund denials, as well as for review of assessments, with revisions to Section 215.26 reflecting that change. *See* Fla. Stat. Sections 72.011, 215.26 (1996). Section 120.575 was recodified at § 120.80(14)(b) in 1996.

for Review at 8-9. The Department of Revenue opposed review on the ground that prospective-only relief was appropriate for the unconstitutional tax. The Department also argued that the process provided by the state permitting a taxpayer to decline to pay tax, wait until a final assessment for delinquent taxes was issued and then challenge that assessment for delinquent taxes fully satisfied the due process clause, and therefore no additional refund remedy was required. Fla. Opp. at 6-9. The Supreme Court of Florida declined review July 17, 1997. App. 1a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the decision below represents another instance of Florida's continuing resistance to the constitutional requirements constraining a state's freedom to retain unlawful tax revenues, delineated in governing precedents of this Court. The extraordinary recalcitrance of the Florida courts in this area argues strongly that the writ should be granted to reverse the decision below, in order to ensure respect for the requirements of the due process clause and this Court's determinations of law.

In the alternative, if this Court does not conclude that *McKesson* and *Reich v. Collins* require reversal of the decision below, certiorari should be granted in order for the Court to address those questions the Court finds were not resolved by its previous decisions in this area. The scope of the due process right recognized in *McKesson* and the applicable constitutional standards by which to judge the adequacy of the procedures provided to obtain relief from an unlawful tax are issues of considerable importance that have led to continuing confusion in the state courts. Some state courts have accorded cramped readings to *McKesson*, permitting those states to retain unlawful tax revenues.[4] Other state courts have denied

[4] *See, e.g., PIA New Jersey, Inc. v. Director, Division of Taxation*, 13 N.J. Tax 94, 101 (1993) (no retrospective remedy required under *McKesson* for tax violating First Amendment); *Dryden v. Madison County.*, 696 So. 2d 728 (Fla. 1997) (no retrospective remedy required under *McKesson* where unlawful tax was not discriminatory).

relief based on new requirements imposed years after the taxes were paid.[5] Taxpayers are also stymied whenever, unguided by any prior state court decisions, they choose a seemingly available procedure, only to have the state court later determine they should have chosen a different one.[6]

State courts evidently understand that *McKesson* mandates some process permitting taxpayers to protect their property from confiscation under the auspices of an unlawful tax, at least for taxes virtually identical to the one at issue in *McKesson* itself. *See Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) (ordering refund of tax invalid under the commerce clause). Too many states, however, including Florida, have not interpreted the due process clause, or this Court's decisions, to re-

[5] *See, e.g., General Motors Corporation v. Kansas City*, 895 S.W.2d 59 (Mo. Ct. App. 1995) (denial of refund for taxes paid for years 1985 through 1988 based on question of first impression decided in 1994), *cert. denied*, 116 S. Ct. 277 (1995); *Kerr v. Waddell*, 916 P.2d 1173, 1178-79 (Ariz. Ct. App. 1996) (denying relief for taxes paid for years 1984 through 1988 for lack of compliance with requirement made applicable in 1996).

[6] *Compare James B. Beam Distilling Co. v. Georgia*, 437 S.E.2d 782, 785 (Ga. 1993) (relief under state refund law not required under *McKesson* because state provided process for challenging final assessment), *cert. denied*, 513 U.S. 1056 (1994), *with PIA New Jersey*, 13 N.J. Tax at 102 (relief from unlawful tax inappropriate in assessment proceeding because state provided refund procedure); *compare James B. Beam Distilling Co. v. Georgia*, 437 S.E.2d at 785 (refund not required because state provided general declaratory judgment proceeding), *with St. Ledger v. Kentucky Revenue Cabinet*, 942 S.W.2d 893, 900-01 (Ky.) (no relief in general declaratory judgment proceeding required because state provided refund procedure), *cert. dismissed*, 1997 U.S. LEXIS 4425 (Sept. 22, 1997).

quire any notice to taxpayers about what process is available to protect their rights. Similarly, certain state courts have not interpreted the due process clause, or this Court's decisions, to require procedures for obtaining relief from unlawful taxes that fully protect taxpayers from financial sanctions. The decision below would be an excellent vehicle for this Court to address these critical components of due process rights in an area that has been, and can be expected to remain, of recurring interest through the country.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS AND SHOULD BE REVERSED.

The Florida court of appeal gave this Court's decision in *McKesson* an impermissibly cramped reading and wholly ignored this Court's decision in *Reich v. Collins* in reaching its decision to deny meaningful backward-looking relief to Newsweek for payment of taxes under an acknowledgedly unconstitutional tax scheme. Florida's history of evading its obligations under the due process clause in this area, a history that continues in other cases as well as the decision at issue, demonstrates that the decision below is not merely an isolated error. Certiorari is appropriate here in order to ensure respect for this Court's decisions and to secure the rights guaranteed by the due process clause of the Fourteenth Amendment in those states that continue to resist their obligations under the United States Constitution.

A. The Predeprivation Remedy Relied On By The Court Below Was Not "Clear and Certain" As Required By *McKesson*.

In *McKesson*, this Court made clear that the due process clause not only requires states to provide taxpayers with an opportunity to challenge the legal validity of a tax, but also requires them to provide taxpayers "with 'a clear

and certain remedy' for any erroneous or unlawful tax collection." *McKesson*, 496 U.S. at 39 (quotation and citation omitted). The decision below is premised on the understanding that the due process clause is satisfied if the state provides a procedure for obtaining relief from an unlawful tax, whether or not taxpayers should reasonably have known about that procedure when the state required them to pay the tax. This view reads the notice requirement out of the due process clause altogether, and is irreconcilable with *McKesson*'s stricture that the remedy provided be "clear" and "certain."

The court below relied on a procedure to satisfy the state's due process obligations that was theretofore wholly unknown. *See* Robert S. Goldman, "Florida *Newsweek* Decision Clouds Taxpayer Refund Rights," CCH *State Tax Review* 12, 13 (July 14, 1997) ("The remedy identified by the First District is not exclusive, clear, or certain. Prior to the *Newsweek* decision, it did not exist."). Indeed, the court's ruling that Newsweek could have used that procedure was even inconsistent with prior interpretations of Section 72.011. *See, e.g., Florida Export Tobacco Co. v. Department of Revenue*, 510 So. 2d 936, 942 (Fla. Dist. Ct. App. 1987).

Specifically, the court below determined that Newsweek should have made use of the statutory remedy provided in Section 72.011 to challenge the sales tax when it was due. That statute expressly provided an opportunity for taxpayers to contest the legality of a *final assessment* for delinquent taxes by filing an action in circuit court after paying the disputed tax into the court's registry or posting a bond. The statute alternatively permitted taxpayers to contest a final assessment by petitioning the Department of Revenue under Section 120.575. App. 13a, 16a-18a. It did not by its terms authorize or even mention challenges to a tax when due, or at any time before a final assessment for delinquent tax is issued by the Department, and no prior decisions authorized such a challenge pur-

suant to that statute. Significantly, the Department of Revenue's regulations themselves referred only to challenges to final assessments. *See, e.g.*, Fla. Admin. Code. R. 12-6.003, 12-6.0033, 12-6.004 (1987).

Thus, the court of appeal's interpretation of Section 72.011 as providing a procedure for challenging a tax when due, but before any assessment, was unprecedented and unanticipated. No language in the statute suggested such a procedure was available. The agency charged with implementing the tax laws did not consider such a procedure available. Nothing in Florida law would have alerted a reasonable taxpayer to the possibility that such a procedure was available. There is of course no doubt that the power to interpret a state statute to provide a not previously recognized method of challenging tax laws is entirely within the province of the state courts. The power to deny relief on that basis for unlawful taxes paid earlier, however, is not.

As *McKesson* made clear, the due process clause requires that the opportunity to contest the tax must be a meaningful one. 496 U.S. at 39. A procedure that was not clear and certain at the time the taxpayer was obligated to choose a procedure through which to protect itself against unlawful taxes—*i.e.*, when the tax was due, and the state's full power to impose sanctions could be brought to bear—cannot satisfy the state's due process obligations. If states could rely on previously unknown procedures for challenging unlawful taxes to deny relief under other procedures, they would free themselves altogether from the obligation to return unlawfully imposed taxes. The ability of states to retain unlawful taxes would be limited only by their court's ability to detect new procedures in statutes and regulations or to invent such procedures as a matter of state common law. Florida law, as interpreted by the court below, does not provide the "fair opportunity" to obtain a remedy that *McKesson* found required by the due process clause. 496 U.S. at 39. Indeed, the decision

below places taxpayers in precisely the position *McKesson* prohibited.

B. Denial Of A Refund Remedy Was An Unconstitutional "Bait And Switch" Under *Reich v. Collins*.

The court below also ignored this Court's decision in *Reich v. Collins*, which explained that states could not reconfigure their tax schemes mid-course, by holding out an apparently clear and certain remedy when unlawful taxes were due and then declaring that remedy unavailable after the taxes were paid. 513 U.S. at 108-09. Florida, however, has done just that.

Florida has long held out a generally available refund procedure. *See* §215.26; App. 15a-16a; *see also McKesson*, 496 U.S. at 24 n.4, 38-39. The statute was first adopted in 1943, *see* 1943 Fla. Laws ch. 22008, Section 1, and has remained in effect since. Florida courts have long interpreted the provision to be an unequivocal declaration of state policy to make complete restitution to any taxpayer who pays tax when no tax is due. *See Walgreen Drug Stores Co. v. Lee*, 28 So. 2d 535 (Fla. 1946); *State ex rel. Hardaway Contracting Co. v. Lee*, 21 So. 2d 211 (Fla. 1945) (refund of unconstitutional tax).

Nothing in the statute suggests that the refund remedy provided does not apply if a challenge under Section 72.011 (or any other procedure) is available. Moreover, Florida courts have continued to interpret the statute to require refunds even after Section 72.011 or its predecessors [7] were enacted for taxes to which Section 72.011 or its predecessors were applicable. *See, e.g., Greyhound Lines, Inc. v. Department of Banking and Finance*, 443 So. 2d 162 (Fla. Dist. Ct. App. 1983); *Miller v. Agrico Chemical Co.*, 383 So. 2d 1137 (Fla. Dist. Ct. App. 1980); and *Exxon Corp. v. Lewis*, 371 So. 2d 129 (Fla. Dist.

[7] *See, e.g.*, Fla. Stat. § 26.012 (1975) (providing circuit courts with jurisdiction to hear challenges to tax assessments).

Ct. App. 1978). Instead, taxpayers could choose between waiting for a final assessment and challenging that assessment under Section 72.011, or paying the tax and obtaining a refund under Section 215.26.

Thus, Florida had held out "what plainly appears to be a 'clear and certain' postdeprivation remedy" in the form of its tax refund procedures, "and then declared, only after [Newsweek] and others had paid the disputed taxes, that no such remedy" was available. *Reich v. Collins*, 513 U.S. at 106. Even if taxpayers should have anticipated that Section 72.011 might be interpreted to provide an opportunity to challenge an unconstitutional tax before a final assessment was received, "no reasonable taxpayer would have thought that [this] represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." *Id.* at 106-07 (emphasis added).

Under *Reich v. Collins*, Newsweek was constitutionally entitled to the refund remedy Florida had long provided. Although Newsweek squarely relied on *Reich v. Collins*, the court below utterly ignored that decision, without explanation. App. 2a-9a.

C. The Decision Below Is Not Merely An Isolated Error of Law.

Although this Court does not undertake to correct every misunderstanding of law, the errors below are not isolated mistakes. Florida's continuing hostility toward its obligation to remedy unlawful taxes under the due process clause ensures that the injustice of the decision below will reoccur repeatedly in the future. As this Court knows, *McKesson* itself was a Florida case accepted for certiorari because the Supreme Court of Florida, although acknowledging that the taxes at issue were unconstitutional, had refused on equitable grounds to order relief for those forced to pay them. 496 U.S. at 22. The tax itself also

reflected a less than respectful posture toward constitutional obligations. Florida had imposed a tax that was virtually identical to the tax found unconstitutional in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *McKesson*, 496 U.S. at 46. In response to *Bacchus*, the Florida legislature made "only cosmetic changes" and continued to enforce the patently unconstitutional tax scheme. *Id.* Nonetheless, one of the equitable reasons relied on by the Florida Supreme Court to deny relief was the State's alleged good faith in imposing the tax.[8]

Only five months ago, the Supreme Court of Florida determined that taxpayers forced to pay an admittedly unlawful tax had no right to relief because *McKesson* did not apply "[w]here an invalid tax scheme applies across the board and confers a commensurate benefit." *Dryden v. Madison County*, 696 So. 2d 728, 730 (Fla. 1997). In the Supreme Court of Florida's view, under *McKesson* only "discriminatory" taxes require meaningful backward-looking relief. *Id.* at 729. Thus, having confined *McKesson* to its precise facts, the Florida court found that equitable considerations governed the availability of relief from the unlawful tax at issue. *Id.* at 730. The court then decided that the government had acted in good faith in imposing the tax and held that no relief was due. *Id.*

Two months later, the Supreme Court of Florida declined to review the decision below, which denied relief

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[8] This Court's reversal of the Supreme Court of Florida's decision to provide only prospective relief was never implemented. The liquor tax was never imposed retrospectively on those unconstitutionally exempted, and those who paid the tax were never issued refunds. McKesson itself settled with the State. *See Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 643 So. 2d 16, 17 (Fla. Dist. Ct. App. 1994), *cert. denied*, 514 U.S. 1083 (1995). Another plaintiff in the *McKesson* case was denied backward-looking relief under the Supreme Court of Florida *McKesson* decision reversed by this Court because that plaintiff had not petitioned for certiorari or joined McKesson's petition. *Id.* at 20.

under a long-standing refund statute for Newsweek's payment of tax under an unconstitutional tax scheme. As discussed above, the ground for denying relief was that Newsweek should have availed itself of a different procedure instead, a procedure recognized for the first time in that very decision.

In view of this history, this Court's review is critical so that those subject to Florida taxes, and taxes in other states with similar inclinations, will be able to enjoy the due process rights guaranteed by the United States Constitution.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTIONS LEFT OPEN BY THE COURT'S EARLIER DECISIONS REGARDING THE NOTICE AND PROTECTION FROM SANCTIONS NECESSARY TO COMPORT WITH DUE PROCESS.

If this Court finds that its earlier decisions do not resolve all issues in this case, it should grant the petition in order to address the questions it finds left open by its prior decisions. For example, if the adequacy of the pre-deprivation remedy recognized by the court below is not governed by *McKesson*, this Court should grant certiorari in order to answer the significant questions presented as to what constitutes a "clear and certain" remedy. Further, if Florida's power to withdraw its refund remedy is not governed by *Reich v. Collins* because the Florida refund law is phrased differently than Georgia's, certiorari should be granted to determine whether the due process clause permits "bait and switch" when the remedy withdrawn is similar to Florida's. This Court's clarification of the scope of taxpayers' due process right to obtain relief from unlawful tax laws, and the nature of the obligations it imposes on states, is urgently needed, particularly for those states, like Florida, that appear predisposed to construing the Court's earlier determinations extremely narrowly.

A. Is A Procedure For Obtaining Relief From An Unlawful Tax "Clear and Certain" If Taxpayers Had No Notice That Procedure Was Available At The Time the Tax Was Due?

This Court has made clear that states must provide a "clear and certain" process by which taxpayers may obtain relief from unlawful taxes in order to satisfy the due process clause. *McKesson*, 496 U.S. at 32, 39, 40, 43, 51. The court below, however, plainly did not understand that directive to mean that the process must be clear and certain *at the time the tax was due*. As explained earlier, the court below found that Florida met its due process obligations by providing a procedure that court "discovered" for the first time in considering its decision in this case. Until this decision, issued in 1997, the availability of such a procedure was unknown to the state's courts, to its Department of Revenue and to its taxpayers. *See, supra*, pp. 9-10.

Those obligated to pay the tax, beginning in January 1988, would reasonably only have known they had a choice between waiting for the Department of Revenue to issue an assessment, with attendant interest and penalties, or applying for a refund after paying the tax. They had no notice in 1988, either by the terms of the statute, its judicial interpretations, or the regulations implementing it, that Florida law would be interpreted to permit them to challenge the tax under Section 72.011 before receiving a final assessment.[9]

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[9] One of the judges below relied on the additional availability of a different statute, Fla. Stat. Section 120.575 (1987), which provided that taxpayers could petition the Department of Revenue as an alternative to challenging a tax in circuit court. App. 9a. However, that provision also had not been considered available for challenges to unlawful taxes when they were first due, and appeared by its terms to be limited to challenges to final assessments for delinquent taxes. App. 16a-18a. In addition, administrative hearing officers had not previously been found to have jurisdiction to hear

The adequacy of a previously unknown predeprivation procedure was one of the questions this Court expressly left open in *Reich v. Collins*, deciding instead to rest its decision on other grounds. *See Reich v. Collins*, 513 U.S. at 111 (the "constitutional adequacy of these [predeprivation] procedures [is] an issue on which we express no view"). This important question is again squarely presented by the decision below.

If state courts are provided no guidance on this issue, they will in effect be handed a loophole large enough to swallow the entire rule established in *McKesson* and the long line of decisions on which *McKesson* relied. As long as notice to taxpayers of the appropriate procedure is not required *at the time the tax is due*, taxpayers will be at the mercy of state courts with the power to determine new rules. Theoretically, a determined state court system could ensure that no relief is ever actually provided, by repeatedly inventing new procedures or requiring new prerequisites.[10] At best, different federal due process rights are likely to be observed in different states, or even in different courts, with results that are erratic, unfair, and beyond the power of taxpayers to affect.

This Court's review is needed to further elucidate the principles announced in *McKesson* and its progeny, and to achieve uniform enforcement of constitutional rights.

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constitutional challenges to a tax. *See Don's Sod Co. v. Department of Revenue*, 661 So. 2d 896 (Fla. Dist. Ct. App. 1995) (hearing officers have no jurisdiction to consider constitutional issues).

[10] *See also General Motors Corporation*, 895 S.W.2d 59 (denying refund for taxes paid in the 1980s based on 1994 decision that state tax protest requirement was also applicable to relief for municipal license tax) (Missouri); *Kerr v. Waddell*, 916 P.2d at 1178-79 (relief not available for taxes paid 1984 through 1988 based on 1996 decision requiring exhaustion of administrative remedies for declaratory judgment action) (Arizona). The state courts inclined to deny relief based on subsequent law are clearly not limited to Florida and Georgia.

B. Does A Procedure Comport With Due Process If Taxpayers Contesting A Tax As Unlawful May Be Subject To Any Financial Sanctions?

The procedure recognized by the court below as adequate does not necessarily protect taxpayers from interest payments or even penalties if the tax is upheld. By its terms, the procedure applied only to challenges of final assessments for delinquent taxes issued by the Department of Revenue. App. 13a-15a. Such assessments include penalties and interest from the date the tax was due. The court of appeal held that the procedures set forth in that statute could also be used to challenge unlawful taxes as soon as they were due, without waiting for an audit and final notice of deficiency. App. 6a. The court found that any taxpayer could follow the procedures specified in that statute, paying the amount of the contested tax into the registry of the court or posting a bond, as a prerequisite to challenging the validity of the tax. App. 6a-7a.

The court also explained that a "taxpayer cannot reasonably be considered liable for *penalties* for availing himself of the procedure provided in chapter 72" (emphasis added), citing only a concurring opinion in another case. App. 7a. To the extent the court was interpreting Section 72.011 rather than merely predicting the judgment of others in the future, this suggests that taxpayers would not be subject to penalties for challenging the validity of a tax law under this procedure. The court's statement, however, remains worrisome for its failure to make clear that not only would it be unreasonable to hold such a taxpayer liable for penalties, it would be contrary to law.

Moreover, the court did not hold or even suggest that taxpayers would be protected from *interest* charges accruing during the pendency of such a challenge. And, indeed, the procedure provides no guaranteed protection from interest charges. Under Florida law the clerk of the court has discretion to place the funds in an interest-bearing account or a non-interest bearing account. Fla. Stat., Sec-

tion 28.33; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); App. 7a. The court did not hold that the clerk was required to place the funds in an interest-bearing account, nor did it hold that interest charges could not be imposed on taxpayers availing themselves of this procedure. Thus, the procedure the court below found constitutionally adequate provides no protection to the taxpayer against mounting interest charges, even though the taxpayer has no control over the funds during the proceedings. Indeed, whether the funds are permitted to earn interest to satisfy or at least offset any interest charges is uniquely within the unfettered discretion of the state.[11]

The court of appeal's reliance on other mechanisms available to the taxpayer does not alleviate the taxpayer's vulnerability to this financial sanction. For example, the taxpayer can file a cash bond or surety bond, App. 7a, which in itself is expensive, and also does not relieve the taxpayer of interest charges. In addition, the taxpayer can "seek a court order approving an alternative arrangement" or seek "a waiver from the Department [of Revenue] of the obligation to pay the contested tax into the registry of the court" or "file a motion for court approval of an alternative security arrangement," App. 7a—all mechanisms entirely within the discretion of the state to permit or withhold.[12]

[11] If the clerk does place the funds in an interest-bearing account, the accrued interest belongs to the taxpayer. App. 6a. Thus, if the accrued interest is sufficient to cover the statutory interest due the Department of Revenue if the tax is upheld, the taxpayer is protected. However, the interest rate paid to the taxpayer is determined by commercial banks; the interest rate charged for delinquent payment is, again, entirely within the discretion of the state, and has been 12 percent per year at all times relevant to this petition. *See* Fla. Stat. § 212.12(3).

[12] The alternative measure for challenging the tax before paying it to the Department of Revenue that provided the basis for one judge's concurrence, § 120.575, also afforded no protection to tax challengers from mounting interest charges or penalties. App. 17a.

This Court's guidance is needed to address whether the due process clause requires states to provide a process that permits taxpayers to challenge the legal validity of a tax *without incurring any financial sanctions*, including interest and penalties. Further instruction is needed with respect to whether a state's discretion to waive sanctions is constitutionally sufficient, or whether protection from financial sanctions under these circumstances must be unconditional.[13]

C. What Constitutes Holding Out A Remedy Such That Withdrawal Of That Remedy Is An Unconstitutional Bait And Switch?

This Court has held that a state holding out a refund remedy to taxpayers may not withdraw that remedy after the taxes have been paid, at least when the refund statute is mandatory. *Reich v. Collins*, 513 U.S. at 111 (noting that the Georgia refund statute provided that the State " '*shall*' refund '*any and all*' taxes or fees which are determined to have been erroneously or *illegally assessed* and collected from' a taxpayer") (emphasis added). The Florida refund statute is not quite identical. It provides that the "Comptroller of the state *may* refund to the person who paid same . . . [a] payment where no tax . . . is due." § 215.26(1) & (1)(b) (emphasis added); App. 15a.

As discussed earlier, despite the discretionary language, Florida courts had long interpreted the provision to require refunds to taxpayers who paid tax when no tax is due, both before and after Section 72.011 was enacted. *See, supra*, pp. 11-12. Further, no language in the statute

[13] *See also James B. Beam Distilling Co. v. Georgia*, 437 S.E.2d at 785-86 (procedure for challenging final assessment for delinquent taxes satisfies due process notwithstanding imposition of interest and waiver of penalties solely within discretion of Commissioner; procedure for declaratory judgment satisfies due process even though protection from both interest and penalties requires discretionary decisions by both court and Commissioner).

or its implementing regulations suggests any exception to the availability of the refund remedy. And no court decisions, before the decision below, suggested that refunds would not be available when Section 72.011 provided an alternate remedy.

At least one state determined that a refund remedy couched in virtually identical language may *not* be withdrawn from taxpayers after they have paid their taxes if it has historically been interpreted to require restitution to taxpayers. *See Harper v. Virginia Dep't of Taxation*, 462 S.E.2d 892 (Va. 1995). The state tax department had argued that *Reich v. Collins* did not apply because the statutory language was discretionary. *Id.* at 896. But the Virginia court relied on the state's long history of interpreting the statute to require refund of taxes illegally collected to conclude that it could not constitutionally withdraw that relief after taxpayers had paid the unlawful tax. *Id.* at 897-98. The decision below is in conflict. The court of appeal did not find *Reich v. Collins* dispositive, although it declined to explain why.

Thus, despite the principles set forth in *Reich v. Collins*, open questions apparently remain. What notice must be provided to taxpayers that a long-standing procedure for obtaining relief will no longer be available? Does the answer to that question turn on whether the relief was discretionary? If it does, what factors should a court consider in determining whether the relief was discretionary? Direction from this Court is necessary to ensure uniform understandings of constitutional obligations in this area and appropriate protection of taxpayers in all states.

D. Is Retrospective Relief Required For Payors Of An Unlawful Tax When the Plaintiffs Who Initially Established The Invalidity Of The Tax Received Prospective Relief Only?

In the past decade, this Court has repeatedly addressed and significantly clarified the jurisprudence of retroactivity

in both the criminal and civil areas.[14] This Court has held that it will ordinarily apply new rules of law retroactively. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). It has rejected selective retroactivity, finding that its retroactive application of a federal rule requires every court to give retroactive effect to that decision in pending or future cases, because similarly situated litigants must be treated similarly. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (civil rule); *Griffith v. Kentucky*, 479 U.S. 314 (1987) (criminal rule). Further, this Court has explained that the freedom of states to fashion the relief required by retroactive application of a new rule is limited by their obligation to actually provide such relief. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

A key question this Court has not yet decided however, is if—or when—courts may apply new rules prospectively only. At least one member of the current Court has written that courts do not have the power to apply rules prospectively only. *See, e.g., James B. Beam*, 501 U.S. at 548-49 (Scalia, J., concurring). Another member of the current Court has concurred on this point, but suggested that courts in certain circumstances have equitable powers to fashion relief which may preclude a new rule—although applied retroactively—from having any retroactive effect, such as the power to toll statutes of limitation. *See American Trucking*, 496 U.S. at 222 (Stevens, J., dissenting).

The cases before this Court, however, have thus far presented the Court either with questions of retroactive relief sought by the litigants in the initial challenge to the

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[14] *See, e.g., Griffith v. Kentucky*, 479 U.S. 314 (1987); *American Trucking Ass'ns., Inc. v. Smith*, 496 U.S. 167 (1990); *McKesson*, 496 U.S. 18 (1990); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

law at issue, such as *Lampf, Pleva* and *McKesson*, or with questions of retroactive relief when previous litigants had already obtained such relief, such as *James B. Beam, Harper*, and *Reynoldsville Casket*. In contrast, the instant case involves an important situation not yet addressed by this Court—the rights of litigants to retrospective relief when the litigants initially establishing the invalidity of a tax did not receive such relief.

Here, the litigants who initially challenged the tax at issue received only prospective relief. It is not wholly clear from the record whether they only sought prospective relief or whether such relief was all the Supreme Court of Florida was willing to grant. That court's opinion does not discuss the question and the otherwise successful litigants did not press their claims further.[15]

Thus, Newsweek's claim for meaningful backward-looking relief stands without the additional pillar of such relief having been afforded to similarly situated litigants, and raises the important open questions of the power of courts to apply rules prospectively only, when there are no concerns about uniform application of law. It presents, therefore, a good opportunity for the Court to address this important question which, although not squarely presented by the decision below, is clearly prefigured as an issue on remand by Judge Davis' concurrence.[16]

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[15] The complaint simply asked for a declaratory judgment that the tax statute was void as unconstitutional and a preliminary injunction restraining collection of the tax. Compl. of Magazine Publ. of America, *et al.*, Civ. No. 88-2442, Cir. Ct., 2d Cir., Leon County (July 7, 1988).

[16] The majority below did not address this question; it either found an obligation to apply the *Magazine Publishers of America* rule retroactively or assumed the obligation without deciding. Judge Davis, as discussed above, wrote separately to express her view that "a valid alternative basis" for denying relief here was that equitable considerations determined whether retroactive application of the *Magazine Publishers of America* rule was appropriate, and those considerations do not justify retroactive application of "refund actions brought by taxpayers who were not parties to the *Magazine Publisher* suit" because the constitutional decision would not necessarily have been anticipated. App. 8a-9a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

Case No. 90,431

District Court of Appeal,
1st District—No. 96-1882

NEWSWEEK, INC.,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,
Respondents.

Thursday, July 17, 1997

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 96-1882

NEWSWEEK, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE H. FUCHS and ROBERT F. MILLIGAN,
Appellees.

Opinion filed February 18, 1997

An Appeal from the Circuit Court for Leon County
Judge William Gary

BARFIELD, C.J.

Newsweek, Inc., appeals a final order in which the circuit court denied Newsweek's motion for summary judgment and granted the cross-motion for defendants Lawrence H. Fuchs, as Executive Director of the Department of Revenue, Robert F. Milligan, as Comptroller of the State of Florida, and the Florida Department of Revenue (collectively referred to as the Department), thereby denying Newsweek's request for a tax refund. Because we find no due process violation in the State's failing to provide a refund or other retroactive relief where Newsweek had an adequate predeprivation remedy, we affirm.

Effective July 1, 1987, the Legislature imposed a sales tax on newspapers and magazines. § 212.05(1)(i), Fla. Stat. (1987). Beginning January 1, 1988, the Legislature exempted newspapers from that tax. § 212.08(7)(w), Fla. Stat. (Supp. 1988). The retail sale of magazines remained subject to sales tax under section 212.05(1)(i), Florida Statutes (Supp. 1988). Magazine Publishers of America, Inc. (an association of which Newsweek is a member), and several individual publishers (but not Newsweek individually) challenged the constitutionality of this tax scheme. The trial court held the tax scheme unconstitutional, and that portion of the trial court's order was affirmed by the Florida Supreme Court in *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (Fla. 1990), *cert. granted, judgment vacated sub nom. Miami Herald Pub. Co. v. Florida Dep't of Revenue*, 499 U.S. 972 (1991). In its first opinion, the Florida Supreme Court held the relevant portions of chapter 212 invalid as violative of the First Amendment of the United States Constitution because it unconstitutionally differentiated between magazines and newspapers. The trial judge also ruled with Magazine Publishers that the appropriate remedy for this unlawful taxing scheme was to extend the exemption allowed newspapers by section 212.08(7)(w) to magazine publishers. The Supreme Court reversed that portion of the order, and ruled that the appropriate remedy was to strike the exemption enjoyed by newspapers and to apply the tax evenly. The United States Supreme Court granted certiorari and vacated the judgment for reconsideration in light of *Leathers v. Medlock*, 499 U.S. 439 (1991), in *Miami Herald Pub. Co. v. Department of Revenue*, 499 U.S. 972 (1991). On remand, the Florida Supreme Court again held the taxing scheme unconstitutional in *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992), affirming the ruling that the taxing scheme unconstitutionally violated the First Amendment because the discrimination between newspapers and magazines

was content-based, but reversing the trial court's order to the extent that it held that magazines were entitled to the same exemption as newspapers. Again, the Florida Supreme Court explained that the Legislature had indicated its intent that the tax should be imposed and that, if there was any invalidity in the taxing scheme, the exemption should fall rather than the tax. The Department has taxed both newspapers and magazines since December 9, 1990. *See* Fla. Admin. Code R. 12A-1.008(1)(a)(1994).

Newsweek filed a timely claim for a refund of sales tax paid between January 1, 1988, and December 9, 1990. That refund claim was denied on February 26, 1995. Newsweek then filed an action in circuit court, seeking the refund. Relying upon the holding of the Florida Supreme Court in *Florida Dep't of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992), Newsweek's complaint alleged that the imposition of sales tax on magazines but not upon newspapers in the period between January 1, 1988, and December 9, 1990, was unconstitutional. Count I of the complaint claimed that Newsweek was entitled to a refund of sales tax paid in that interim under the Due Process Clauses of the United States and Florida Constitutions. Count II claimed that the denial of the refund violated section 1983 of Title 42 of the United States Code.[1] Newsweek moved for summary judgment on the basis of Count I only, asserting that Due Process required retroactive relief as a matter of law. That motion was denied.

We must affirm if the trial court was correct for any reason. As the Florida Supreme Court explained in *Chase v. Cowart*, 102 So. 2d 147, 150 (Fla. 1958):

[1] Newsweek has not appealed the circuit court's order granting summary judgment as to Count II. *See Witmer v. University of Florida Police Department*, 610 So. 2d 87, 88 (Fla. 1st DCA 1992) (affirming order granting motion to dismiss "to the extent it dismisses the section 1983 action against the state and its officers sued in their official capacity").

> Decrees and judgments in cases which come to an appellate court for review are presumed to be correct and free from error. We are required to uphold the lower court if valid grounds exist therefor. While the grounds or reasoning used by the trial court or chancellor are frequently helpful to an appellate court on review, they are not controlling. The decision of the appellate court must be made, not on the basis of whether the trial court or chancellor traveled the proper route, used proper reasoning, or laid his conclusion on proper grounds, but rather on whether his conclusion is correct or incorrect.

See also DSA Group, Inc. v. Gonzalez, 555 So. 2d 1234 (Fla. 2d DCA 1989); *Whitney v. State*, 184 So. 2d 207, 209 (Fla. 3d DCA) (applying "doctrine that even if the wrong reasons were given [but] the right result was obtained, the order here under review should be affirmed"), *cert. denied mem.*, 192 So. 2d 490 (Fla. 1966), *cert. dismissed*, 389 U.S. 138 (1967).

The trial court correctly ruled that Newsweek is not entitled to a refund under the Due Process Clauses of the United States and Florida Constitutions. Newsweek relies upon the holding in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990) that the Due Process Clause requires "meaningful backward-looking relief" when a taxpayer is forced to pay a tax before having an opportunity to establish the unconstitutionality of that tax. Below the Department contended that *McKesson* is distinguishable because, while the liquor taxes at issue in *McKesson* were not encompassed within the procedures for predeprivation relief in chapter 72 of the Florida Statutes, the sales tax paid by Newsweek could properly have been contested in a predeprivation proceeding pursuant to section 72.011. We agree that *McKesson* is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a

meaningful opportunity to secure postpayment relief when the state penalizes the taxpayer for failing to pay first and obtain review of the tax's validity later in a refund action. The penalties which the Supreme Court found coerced taxpayers into paying the tax before contesting the validity of the taxing scheme in *McKesson* included the possibility that the county sheriff could be directed "to levy upon and sell the delinquent taxpayer's goods and chattels to recover the amount of the unpaid tax plus a penalty of 50%, along with interest of 1% per month" as well as the possibility that the Division might revoke or decline to renew the distributor's license. *McKesson*, 496 U.S. at 38 n. 20.

In the present case, the taxpayer could have availed itself of a predeprivation remedy under section 72.011, Florida Statutes (1987). Newsweek had the option of filing suit in circuit court to contest the legality of this tax and paying the amount of the contested tax into the registry of the court. *See* § 72.011(1), (3)(b). One who contests a tax and utilizes the procedure of paying the contested amount into the registry of the court cannot be said to have evaded the payment of the tax for purposes of liability for the penalty provided in section 212.12(2)(a), nor can the ultimate payment of such funds be considered "in jeopardy" for purposes of the provision in section 212.15(4) (under which a warrant may be issued for collection by the sheriff through levying upon the property of the taxpayer). The taxpayer retains the ownership of the funds paid into the registry of the court, as well as any interest earned on those monies. *See Greco v. Tampa Wholesale Co.*, 522 So. 2d 506 (Fla. 2d DCA) (explaining that under *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) the funds deposited in the registry of the court did not become public funds, and that earnings thereon were an incident of the ownership of the funds), *review denied mem.*, 531 So. 2d 168 (Fla. 1988), *cert. denied mem.*, 488 U.S. 1006 (1989). More-

over, while section 28.33, Florida Statutes (1995) states, in pertinent part, that "[m]oneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, . . ." the taxpayer also has the right to file a cash bond or surety in the amount of the contested tax assessment, or to seek a court order approving an alternative arrangement. § 2.011(3)(b)2.; *see also Don's Sod Co., Inc. v. Florida Dep't of Revenue*, 661 So. 2d 896 (Fla. 5th DCA 1995). *See generally Florida Dep't of Revenue v. Nu-Life Health and Fitness Center*, 623 So. 2d 747 (Fla. 1st DCA 1992) (section 72.011 not an unconstitutional deprivation of access to courts, because the taxpayer has the alternative of seeking a waiver from the Department of the obligation to pay the contested tax into the registry of the court or to file a motion for court approval of an alternative security arrangement; also finding that there was no denial of access to courts because the taxpayer has the alternative of filing an administrative petition under chapter 120 without having to tender the amount of the contested tax). A taxpayer cannot reasonably be considered liable for penalties for availing himself of the procedure provided in chapter 72. *See State ex rel. East Coast Lumber & Supply Co. v. Lee*, 172 So. 722, 728 (Fla. 1937) (Davis, J., concurring). Thus, the coercive penalties which deprived the taxpayers in *McKesson* of any effective predeprivation remedy are not factors in this case. The taxpayers in *McKesson* were subject to onerous penalties if they did not pay the disputed tax before seeking a refund in a proceeding contesting the constitutionality of the tax. They had no predeprivation remedy because section 72.011 was not available to contest the liquor taxes at issue in that case; for that reason, *McKesson* is inapplicable.

Accordingly, we AFFIRM the order denying Newsweek's motion for summary judgment and granting final summary judgment to the defendants.

DAVIS, J., CONCURS WITH WRITTEN OPINION; BENTON, J., CONCURS IN RESULT WITH WRITTEN OPINION.

DAVIS, J., Concurring.

I agree with the decision holding that Newsweek's Due Process rights were not violated by the state's refusal to provide a refund or other retroactive relief to Newsweek. In addition, I believe there is a valid alternative basis for finding *McKesson* distinguishable and affirming the trial court. In *McKesson*, the taxpayers filed suit challenging the constitutionality of the taxing scheme and seeking a refund of the taxes paid pursuant to that scheme. The Supreme Court was required to consider the proper remedy for the constitutional violation established in that very case. In contrast, Newsweek asserts that it was not a party to the *Magazine Publishers* case in which the unconstitutionality of this taxing scheme was determined. Thus, the issue presented in the instant case is not the one found in *McKesson* (i.e.: the correct remedy to be afforded to the party who has established the unconstitutionality of the tax scheme), but rather whether the *Magazine Publishers* decision invalidating the tax scheme should be applied retroactively to justify a refund action by one who was not a party to the first case.

In *American Trucking Ass'n., Inc. v. Smith*, 496 U.S. 167 (1990), the Court held that taxpayers were not entitled to have an intervening case in which the unconstitutionality of a tax was decided applied retroactively to authorize refunds of the tax they had paid while the statute was believed to be valid. *American Trucking* explains that equitable considerations are relevant to the determination whether a decision should be applied retroactively. 496 U.S. at 179. Just as this court reasoned in *Dryden v. Madison County*, 672 So. 2d 840, 843 (Fla. 1st DCA), *review granted mem.*, 678 So. 2d 338 (Fla. 1996), *McKesson* did not over-rule *Gulesian v. Dade*

County School Board, 281 So. 2d 325 (Fla. 1973) in which the court held that equitable considerations justified the denial of refunds of an unconstitutional tax. *See also Martinez v. Scanlan*, 582 So. 2d 1167, 1174, 1175 n. 7 (Fla. 1991) (citing both *Gulesian* and *McKesson*). The taxing scheme contested successfully in *Magazine Publishers* was facially content-neutral. It was invalidated because a rule promulgated by the Department of Revenue established that the statutory scheme was being applied discriminatorily based upon content in violation of the First Amendment. *Magazine Publishers*, 604 So. 2d at 461-62. Equitable considerations do not justify the retroactive application of the *Magazine Publishers* decision in refund actions brought by taxpayers who were not parties to the *Magazine Publishers* suit, based upon the fact that this statute was facially content-neutral as well as the *Leathers v. Medlock*, 499 U.S. 439 (1991) decision holding that distinctions in taxation between different types of media are not necessarily violative of the First Amendment.

BENTON, J., concurring in result.

I concur on the narrow ground that sections 72.011(1) and 120.575, Florida Statutes (1987), taken together, "provided a fair and meaningful predeprivation procedure," *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 38 n.21, 110 S. Ct. 2238, 2251, 110 L. Ed. 2d 17 (1990), which the taxpayer bypassed at its peril.

APPENDIX C

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 95-1971

NEWSWEEK, INC.,

Plaintiff,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a state agency,

-and-

LAWRENCE H. FUCHS, as Executive Director of the Department of Revenue of the State of Florida,

-and-

ROBERT F. MILLIGAN, as Comptroller of the State of Florida,

Defendants.

FINAL SUMMARY JUDGMENT

On November 29, 1995, the above styled case was heard before this Court on Plaintiff's Motion for Summary Judgment as to Count I of the Complaint and Defendants' Motion for Summary Judgment. This Court finds that there are no issues of material fact involved and that summary judgment is appropriate for this case. Having reviewed the documents, pleadings and memoranda of law filed in this case by the parties and having heard the arguments of Counsel in this case, it is

ORDERED AND ADJUDGED

1. Plaintiff's Motion for Summary Judgment as to Count I of the Complaint is hereby denied.

2. Defendants' Motion for Summary Judgment, for the reasons, arguments and the authorities contained therein, is hereby granted.

3. Each side shall bear its own costs and attorneys fees.

4. Plaintiff shall take nothing from this action.

5. Defendants shall goes hence without day.

DONE AND ORDERED this 12th day of April, 1996.

/s/ William Gary
WILLIAM GARY
Circuit Court Judge

APPENDIX D

DISTRICT COURT OF APPEAL
FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

March 27, 1997

Case No: 96-01882
L.T. Case No. 95-1971

NEWSWEEK, INC.,
Appellant(s),

v.

DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,
Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and for rehearing en banc, and motion for certification, filed March 5, 1997, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, Clerk

By: /s/ Anne Moore
Deputy Clerk

APPENDIX E

RELEVANT STATUTORY PROVISIONS

Fla. Stat. § 72.011 (1987)

72.011 Jurisdiction of circuit courts in specific tax matters; administrative hearings and appeals; time for commencing action; parties; deposits.

(1) A taxpayer may contest the legality of any assessment of tax, interest, or penalty provided for under s. 125.0104, chapter 198, chapter 199, chapter 201, chapter 203, chapter 206, chapter 207, chapter 211, chapter 212, chapter 213, chapter 214, chapter 220, chapter 221, s. 336.021, s. 336.025, chapter 376, or chapter 624 by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However, once an action has been initiated under s. 120.56, s. 120.565, or s. 120.57, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to s. 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

(2) No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final. The Department of Revenue shall establish by rule when an assessment becomes final for purposes of this section and a procedure by which a taxpayer shall be notified of the assessment. It is not necessary for the department to file or docket any assessment with the agency clerk in order for such assessment to become final for purposes of an action initiated pursuant to this chapter or chapter 120.

(3) In any action filed in circuit court contesting the legality of any tax, interest, or penalty assessed under a

section or chapter specified in subsection (1), the plaintiff must:

(a) Pay to the department the amount of the tax, penalty, and accrued interest assessed by the department which is not being contested by the taxpayer; and either

(b) 1. Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director of the department; or

2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment endorsed by a surety company authorized to do business in this state, or by any other security arrangement as may be approved by the court, and conditioned upon payment in full of the judgment, including the taxes, costs, penalties, and interest, unless this requirement is waived in writing by the executive director of the department.

Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed.

(4) (a) Except as provided in paragraph (b) of this subsection, an action initiated in circuit court pursuant to subsection (1) shall be filed in the Second Judicial Circuit Court in and for Leon County or in the circuit court in the county where the taxpayer resides or maintains its principal commercial domicile in this state.

(b) Venue in an action initiated in circuit court pursuant to subsection (1) by a taxpayer that is not a resident of this state or that does not maintain a commercial domicile in this state shall be in Leon County. Venue in an action contesting the legality of an assessment arising

under chapter 198 shall be in the circuit court having jurisdiction over the administration of the estate.

(5) The requirements of this section are jurisdictional.

(6) This section is not applicable to actions for refund of taxes previously paid.

(7) Any action brought under this chapter is not subject to the provisions of chapter 45 as amended by chapter 87-249, Laws of Florida, relating to offers of settlement.

Fla. Stat. § 215.26 (1987)

215.26 Repayment of funds paid into State Treasury through error.

(1) The Comptroller of the state may refund to the person who paid same, or his heirs, personal representative, or assigns, any moneys paid into the State Treasury which constitute:

(a) An overpayment of any tax, license, or account due;

(b) A payment where no tax, license, or account is due; and

(c) Any payment made into the State Treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.

(2) Application for refunds as provided by this section shall be filed with the Comptroller, except as otherwise provided herein, within 3 years after the right to such refund shall have accrued else such right shall be barred. The Comptroller may delegate the authority to accept an application for refund to any state agency vested by law with the responsibility for the collection of any tax,

license, or account due. Such application for refund shall be on a form approved by the Comptroller and shall be supplemented with such additional proof as the Comptroller deems necessary to establish such claim; provided, such claim is not otherwise barred under the laws of this state. Upon receipt of an application for refund, the state agency to which the funds were paid shall make a determination of the amount due. If an application for refund is denied, in whole or in part, such state agency shall so notify the applicant stating the reasons therefor. Upon approval of an application for refund, such state agency shall furnish the Comptroller with a properly executed voucher authorizing payment.

(3) No refund of moneys referred to in this section shall be made of an amount which is less than $1, except upon application.

(4) This section is the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury.

(5) When a taxpayer has pursued administrative remedies before the Department of Revenue pursuant to s. 213.21 and has failed to comply with the time limitations and conditions provided in s. 72.011 and s. 120.575, a claim of refund under subsection (1) shall be denied by the Comptroller. However, the Comptroller may entertain a claim for refund under this subsection when the taxpayer demonstrates that his failure to pursue remedies under chapter 72 was not due to neglect or for the purpose of delaying payment of lawfully imposed taxes and can demonstrate reasonable cause for such failure.

120.575 Taxpayer contest proceedings.—

(1)(a) In any administrative proceeding brought pursuant to chapter 120 as authorized in s. 72.011(1), the taxpayer or other substantially affected party shall be designated the "petitioner" and the Department of Revenue shall be designated the "respondent."

(b) In any such administrative proceeding brought pursuant to s. 120.57(1) as authorized in s. 72.011(1) to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon or penalty therefor, the following procedures shall apply, any provisions of the chapter to the contrary notwithstanding:

1. The petition shall be filed with the division, which shall forward a copy to the department immediately upon receipt of the petition.

2. The hearing officer or panel provided in s. 120.65(5) shall conduct all proceedings under this paragraph.

3. Within 10 days after receiving the petition, the hearing officer or panel shall accept or deny the petition.

4. Within 30 days after the hearing or receipt of the hearing transcript, whichever is later, the hearing officer or panel shall issue an order, which shall consist of findings of fact, conclusions of law, interpretation of administrative rules, and any other information required by law or rule to be contained in the final order. Such order shall affirm or deny the assessment, interest, or penalty and shall determine the amount of any assessment, interest, or penalty.

5. The order of the hearing officer or panel shall be final agency action.

(2) In any administrative proceeding brought pursuant to s. 120.57, the department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the department made the assessment.

(3)(a) Before a taxpayer may file a petition under this chapter, he shall pay to the department the amount of taxes, penalties, and accrued interest assessed by the de-

partment which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

(b) The requirements of s. 72.011(2) and (3)(a) are jurisdictional for any action under this chapter to contest an assessment by the Department of Revenue.